The First Annual BC Symposium on Conflict Resolution – Investing in DR Futures: Shaping Directions in Policy, Research and Pedagogy.

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The Role of Government Policy in Shaping DR Futures in BC

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Introduction

The following areas are addressed in this paper:

- The role of government policy in promoting and shaping ADR in BC
- How DR policies are formulated.
- What are the policy motives, what are BC's policy objectives, how are these policy objectives implemented, what are the outcomes so far, how well is mediation working, is it measuring up to expectations?
- Competing policy objectives, policy options, research from other jurisdictions, working with stakeholders, dangers, use of legislation and future directions.
- Options respecting mandatory mediation.

Introduction

Government policy toward ADR has the potential to significantly influence both the extent of DR growth or expansion, and the shape of DR, what processes are used and what DR looks like in practice. But, how should government use this power?

Government has many resources to bring to the development of DR, including,

- research and policy-making capacity;
- links with other jurisdictions;
- legislative and regulatory authority; and
- constitutional responsibilities and authorities respecting the administration of justice.

Government also has a number of interests in this area, including its potential to enhance access to justice and achieve court efficiencies, as well as public protection.

Jurisdictions across the common law world are turning to DR options for assistance in addressing problems of cost, delay and complexity in the justice system. In the last 10 years there has been huge growth in government sponsored DR programs around the world. I want to emphasize that, although this paper speaks in terms of *government* decisions and policies, in practice these decisions are not made by government alone. Major policy decisions are typically made, and new programs typically implemented, with the input and involvement of the judiciary, the bar and other justice system stakeholders.

The policy context

It was not until the early 1980's that conflict resolution and "alternative dispute resolution" began to generate widespread interest amongst the Canadian public, bar and judiciary. The ideas initially made their way into the system largely via family law, but their potential for broader application was quickly recognised. This interest was spurred by problems that were very serious in the 1980's, and are no less pressing today. From the court user's perspective the courts are unaffordable, overly complex, and take too long. Related criticisms also addressed by the alternative processes are that litigation:

- needlessly amplifies conflict and polarizes parties;
- favours the party with the greatest resources;
- allows procedure to trump substance; and
- creates destructive and unnecessarily win/lose dichotomies

By the 1980's an increasing number of academics and jurists were publicly expressing apprehension about these weaknesses, and predicting varying kinds and degrees of failure of our civil justice system. At the same time, evidence from the U.S. was suggesting that mediation could in fact be a simpler, more user-friendly dispute resolution process.

Likewise, from governments' perspective the traditional approaches tend to be costly, and result in growing court backlogs and delays. This threatens to make justice dangerously inaccessible to a large number of people. Dissatisfaction on the part of both gove. ment and court-users created political will and a consumer-driven demand for change.

In 1996 the Canadian Bar Association published the *Systems of Civil Justice Task Force Report.* It made 53 recommendations, touching on everything from changing procedural rules, to judicial case management systems, to use of technology, to changes to legal education. Its first recommendation was that every Canadian jurisdiction make non-binding DR processes available as early as possible in the litigation process, and use of these DR processes be a pre-condition to using the court system.

The Report's strong endorsement for mediation was based on the fact, now clearly established, that mediation, if properly used, is effective (i.e., mediation settles a significant number of cases sooner, at reduced cost and in a manner acceptable to the parties and their counsel). Many other reports have now been published in various jurisdictions, and they all come to the same conclusion - early, consensual resolution of disputes holds the greatest promise for reducing costs and delays and enhancing access to justice in a manner that is consistent with the principles and values that underlie our common law justice systems.

In 1996 the Ministry of Attorney General created a dedicated resource, the Dispute Resolution Office ("DRO"), with a mandate to expand the use of early, consensual dispute resolution processes in the court system and in agencies, boards, commissions and tribunals within government.

Creating DR policy

The DRO has taken a number of steps to devise and implement a comprehensive DR policy. A number of these steps are outlined in this section.

The Ministry of Attorney General had articulated a basic DR policy early in the 1990's. It provides, in part, that:

> *The Ministry of Attorney General is committed to a justice and conflict resolution environment which includes a wide range of dispute resolution options. These options include established adjudicative methods of dispute resolution and collaborative methods of dispute resolution such as conciliation, facilitation, negotiation, mediation and other consensus based processes.*

The DRO concluded that its focus would be on early, consensual dispute resolution processes. The emphasis should be on "early", because it is well recognised that most civil cases (estimates range from 93 – 97%) do not go to trial.[1] The problem is not so much that cases need mediation to resolve, as they need mediation to resolve *earlier*. The issue is timeliness and the need to reduce late ("court house steps") settlements. This needs to be stressed because of the increased process costs that accrue with late settlements. Put another way, late settlements have a reduced impact on the problems of cost and delay. As such, mediation should be seen not so much as an alternative to trial as an adjunct to negotiation. It also follows that the driving policy objective behind ADR generally, and mediation specifically, is broader than the simple promotion of settlement.

Related to this, the DRO decided, would be promotion of the model of "managing cases to settlement", as opposed to the more traditional practice of "managing cases to trial". The traditional approach to dispute resolution has been to place all disputes on a procedural track aimed towards adjudication, while relying on the fact that most of them will resolve before actually reaching the hearing stage. In other words, even though we know that most cases will settle (in fact we are entirely counting on it) we still manage and administer them as if they will be adjudicated. An alternative approach is to start from and build on the fact that most cases settle, and to design systems and create policy to support settlement at every stage of case administration. In part this involves building a system and creating a legal culture that truly recognizes, in the words of Roy McMurtry, that clients come to lawyers looking for solutions, not litigation.

The resilience of the systemic "habit" of managing to trial is well demonstrated by the current tendency for the Notice to Mediate to be used late in the litigation process – recent research out of UBC demonstrates the fact that now we have a good deal of "mediation on the court house steps". This phenomenon reflects a major challenge for those seeking to promote alternate approaches to dispute resolution. The adversarial values of the traditional legal culture can easily weave their way into the collaborative processes. One lawyer-mediator recently observed that 'lawyers are turning mediation into a litigation process'.

The literature makes it clear that the promotion of early, consensual DR processes can be linked to affordability and cost-saving, and to the following additional policy objectives:

- enhanced access to justice;
- greater process satisfaction amongst parties;
- enhanced post-dispute relationships;
- more durable outcomes (i.e. increased compliance);
- more complex remedies;
- better allocation of judicial resources (by removing the easily settled cases from the system); and
- faster or more streamline case processing in the courts.

However, it is important to take into account the possibility of unintended or undesirable consequences arising from the increased use of mediation. These might include:

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[1] What actually happens to those cases is another question. Some researchers suggest for example that many linger indefinitely or are abandoned

- development of a two-tiered system of justice - second-class justice for those who mediate, litigation for those who can afford it;
- mediation could increase cost and delay by creating an additional procedural hoop for litigants to jump through;
- informal DR processes, lacking procedural safeguards, could be forums for the strong to exploit the weak;
- resolution based on idiosyncratic individual values, not legal principle, could dilute the power of the law; and
- ADR could result in loss of the court's voice and diminished evolution of law through precedent.

Implementing DR Policy

The DRO's first step toward broader implementation of a DR policy involved research into the literature from a range of jurisdictions. Our conclusions from this research, very generally, were:

- Large scale (institutional) mediation programs, if properly established, will successfully resolve a significant number of cases quickly and economically, and in a manner satisfactory to the participants;
- Even though the process works very well, parties do not volunteer into mediation programs. Uptake rates in voluntary programs tend to be very low, even while success rates and levels of participant satisfaction are high; and
- If compelled (legislatively or by rules) to participate in mediation, neither settlement rates nor levels of participant satisfaction drop significantly.

The DRO then identified some principles to guide its program design and development process. These principles are set out below.

- *Employ an interest-based approach to program planning and legislation development* - This means working closely with stakeholders to identify their interests, and trying to accommodate as many interests as possible in a fully transparent design process.

- *Avoid the "DAD" approach* – Do not have a small, empowered executive group unilaterally Decide on program design; Announce the program as a fait accompli; and then Defend the program.

- *Actively involve those who will use the program in the design of the program* - This has the disadvantage that it makes the design process slower and more difficult because resistance must be met up front. However, it has two advantages. First, great deal of helpful information is acquired in the course of responding to the "resistance" (which is reframed in terms of interests). Second, the process ensures that once the product is designed, as many interests as possible have been satisfied, and the users of the system see the design as their own. This "buy in" facilitates a smoother implementation.

- *Implement on a small scale to test new ideas and contain the scope of the project with manageable pilot projects* - This can also be framed as "make your mistakes on the small scale". Pilot sites are picked with great care to be both representative, and to provide a real test of the process.

- *Wherever possible evaluate pilots thoroughly* - It is critical to collect data, measure and formally evaluate initiatives. A quality evaluation is invaluable. It helps you to know what works and does not work and guides further expansion. It also serves as an educational tool and as hard evidence to support program expansion.

- *Support the mediation infrastructure* - In addition to creating specific mediation programs, we looked for ways to make mediation more viable in the community. This objective is connected to changing the dispute resolution culture. We wanted to use government resources strategically to shore up the weak spots in the larger mediation picture. We have developed a number of initiatives pursuant to this objective. In response to the general lack of knowledge about mediation both within the justice system and within the broader community we have promoted education and information initiatives. In response to confusion over who is qualified to mediate and what qualification criteria should be, we initiated and supported the establishment of the BC Mediator Roster Society. The Mediator Roster now enables citizens anywhere in BC to have easy access to, and information about, a pool of qualified mediators. Finally, in response to the concern that mediator skill levels could be improved significantly if there were more opportunities to actually practice mediation skills, we worked with the provincial court and other interested groups to establish the Dispute Resolution Practicum Society which now operates mediation practica out of four small claims registries in B.C.

- *Stimulate the use of mediation through legislation, regulation and policy* - The Notice to Mediate regulations[2] are the most significant example of this. Others include:

    - Small Claims mandatory mediation rules;
    - the Rule 5 registry process (mandatory early attendance on a Family Court Counsellor) in the Provincial Court (Family Relations Act) Rules;
    - various statutory references to mediation in several pieces of legislation (Oil and Gas Act, for example);
    - DR system design and mediation rules in administrative context for ministries, agencies, boards, and tribunals;
    - DR chapter in the Nisga'a treaty agreement; and
    - child protection mediation programs.

Outcomes[3]

Generally, evaluations and data collected in relation to DR initiatives in which the DRO has been involved have been very encouraging. Some of these results are outlined in point form below.

Notice to Mediate[4]

- Implemented in April 1998, initially for motor vehicle personal injury matters only. Now available for residential construction disputes (leaky condos) and general civil litigation. A Notice to Mediate for family disputes is being explored.
- Used about 150 times per month for motor vehicle personal injury (this is in addition to voluntary mediations which are not counted or tracked).
- Settlement rates (all issues) are 80 – 90%.
- In cases where all issues were not settled at mediation, 64% of lawyers said there were positive outcomes sufficient to have made the mediation worthwhile.
- A high (82%) rate of participant satisfaction with the mediator at 4 or 5 on a 5 point scale.
- Plaintiffs use the Notice twice as often as defendants.
- As complexity of the file increases so does use of mediation; i.e. mediation is used more for complex disputes.
- There is very strong support in the bar for the Notice to Mediate process.

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[2] "quasi mandatory mediation" (allows one party to a Supreme Court action to require other parties to participate in a mediation session. Mediations occur in the private sector and the parties pay the mediator)

[3] several research reports are published on the DRO website at - http://www.ag.gov.bc.ca/dro/publications/index.htm

[4] see the DRO website for full background materials on all Ministry DR projects - http://www.ag.gov.bc.ca/dro/

- The Notice is used significantly less often in general litigation (35 times/month), and in residential construction – leaky condo claims (92 times in 2 years) but the rate of use is climbing. Settlement rates are not known, but are estimated at around 75%.
- Included in the findings in recent research out of UBC is the suggestion that the Notice to Mediate is often used too late in the litigation process, after significant process costs have been incurred - "mediation on the court house steps." This is a significant and worrisome finding. It means that there is major advantage of mediation that is not being fully exploited.

Small Claims Mediation

- The BC Dispute Resolution Practicum Society works with the Ministry to operate a mediation practicum program out of four provincial court small claims registries.
- A mixed mandatory and voluntary model is in place pursuant to court rules.
- Based on over 2000 cases (3500 respondents) studied:
    - Voluntary settlement rate = 62%
    - Mandatory settlement rate = from 50 – 54% depending on case-type.
- Satisfaction rates are very high. Based on several thousand exit surveys, about 90% of applicants, respondents and lawyers would want to mediate again. This is consistent with the very high process satisfaction rates almost universally associated with mediation programs, even mandatory programs.
- The mediator training component has been researched and found to be very effective as a training program and highly rated by student mediators.
- We believe that this program is doing a great deal to support the mediation infrastructure and to facilitate a change in dispute resolution culture in BC. Graduate mediators are taking their enhanced mediation skills into a wide range of professional and employment settings. The program is also supplying many mediators to the BC Mediator Roster and for initiatives like the Child Protection Mediation Program.

Other Programs

- Research on the Surrey Court Facilitated Planning Meeting Project shows that this innovative approach to resolving child protection disputes has been extremely successful. This program involves early mediation between social workers representing the Director of Child, Family and Community Services and parents whose children are thought to be in need of protection. Details of the high settlement rates and high participant satisfaction rates are set out in research conducted by Focus Consultants and published on the DRO website.
- The British Columbia Mediator Roster is a central and accessible (web-based) list of trained and experienced mediators who subscribe to a code of mediation conduct. The Roster was established in 1998 to support the use of mediation for civil, non-family, cases in the B.C. Supreme Court. A Family Roster was established in June 2002. Mediators on the Civil Roster and the Family Roster can also be used for disputes outside the court system. The Roster provides a way to organize and distribute reliable information about mediators, facilitate access to mediators, create a provincial standard for acceptable levels of mediator training and experience, and ensure that mediators on the Roster meet these standards.
- See http://www.ag.gov.bc.ca/dro/publications/bulletins/programs-initiatives.htm for an overview of other Ministry DR initiatives.

Should BC consider other forms of mandatory mediation?

I would argue that mandatory mediation is not only viable, it is a necessary process within the civil justice system. This is based upon evidence that up-take rates for voluntary mediation programs are very low, even when settlement and satisfaction rates are very high. This argument is also supported by findings that when parties do attend mandatory mediation settlement rates are not much lower than voluntarily mediation, and process satisfaction rates typically very high.

The question now frequently raised is: Is the Notice to Mediate the best possible format?

It may be instructive to try to compare the results of the Ontario mandatory mediation system and the BC Notice to Mediate for personal injury cases. Recognizing that comparing the two systems is something of an apples and oranges exercise, what follows is an attempt to stimulate some thought about the relative merits of two different approaches.

	Ontario	**BC**
Policy Objective	Fair and early resolution outside of court, thereby saving both time and money.	Fair and early resolution outside of court, thereby saving both time and money.
Form of mandatory mediation	fully mandatory mediation: • highest level of compulsion, • blanket mandate – with some exceptions, every case mediates, • within 90 days of 1st S/Defence, • may opt out only with leave of the court. Mediation is the price of admission to use the court system.	Quasi-mandatory mediation: • notice to mediate, • represents the lowest level of compulsion, • party driven – a party decides to mediate then compels the other side, • timing parameters are broad and largely in control of parties • targeted, selective.
Percentage of cases mediated:	100% of selected categories	13% voluntarily referred, 7.5% actually make it
Pace / early settlement	• 54% occurred < 3 months • 86% < 6 months • significant reductions in the time taken to dispose of cases	• UBC research: used very late in the life of the file, after most of the process costs have been incurred • Some reduction in the period of time to disposition
Outcome Settlement rates	40% all issues; 17% some issues	80% – 90% all issues regardless of complexity (ICBC cases)
Satisfaction levels	"in general litigants and lawyers have expressed considerable satisfaction with mediation"	82% rate their satisfaction with the mediator at 4 or 5 on a 5 point scale
Costs Savings	• When cases settle at or soon after mediation, litigants save a substantial amount of money	• Not significant for personal injury because of contingency fee arrangements, and because of resolution late in the litigation process • May be more significant for Construction and General Notice: number of trials declining, and anecdotal evidence is that the Notice is avoiding costly trials on large, complex cases

As can be seen, the Ontario approach captures a much larger pool of cases than the BC pool. The Ontario approach also settles the cases earlier than the BC process but fully settles only 40%, while the BC approach settles 80% in ICBC cases later in the litigation process. Do these differences boil down to a policy choice between a lower percentage of settlements, of much larger pool of cases, earlier in the litigation process, or a higher percentage of settlements, of a much smaller pool, later in the litigation process?
To further the analysis, consider some of the possible disadvantages of the BC model:

- late use of the Notice mutes its impact on the system;
- growth in mediation is slower;
- resolution is too late; settlement is still occurring on the court house steps;
- savings to litigants are too small;
- it fails to fully exploit the current pro-mediation environment;
- the impact on legal culture is reduced; n a fully mandatory system, everybody gets exposed and everybody gets educated.

On the other hand, the BC Notice to Mediate model has a number of advantages:

- mediation growth is more stable, and in any event it increases use of mediation faster than a voluntary model;
- because it is a less radical change than the fully mandatory model, it is less likely to provoke opposition from the bench or bar. It gives more time for the legal culture to digest mediation;
- this approach is not as likely to result in overstepping the supply of skilled mediators; it is self-moderating;
- the BC approach is simpler and less expensive to implement and to administer than a fully mandatory system;
- cases need not be tracked in any way by the registry unless a problem (non-compliance, contested adjournment) arises;
- the mediated cases self-select, therefore there is a greater chance of settlement, a greater chance that the case is appropriate for mediation, and a smaller chance that neither lawyer will want to be there.

On balance, these advantages notwithstanding, the benefits of the Ontario approach should provoke some serious introspection in BC and, at the very least, some discussion about the prospect of a more fully mandatory model for BC.

Future directions

A solid ADR foundation now exists within BC. The fundamental elements of an "ADR system" are in place:

- through the Continuing Legal Education Society and the Justice Institute we have some of the best mediation training programs in Canada;
- the Universities are offering an increasingly broad and sophisticated range of DR education;
- structured practical training experiences are now available;
- our initial experience with mandatory mediation has been very positive;
- high quality research is now informing and refining our theory and practice;
- legal culture is beginning to accommodate and adopt non-adversarial approaches (most lawyers are now experienced with mediation and judges are using collaborative approaches to facilitate settlement); and
- government and other large public institutions are seeking to incorporate collaborative approaches to dispute resolution into the way they do business.

At the same time it is clear that much remains to be done if we are to utilize the full potential of mediation. While it is being used in virtually every area of litigation, it should be used for many more cases than it is now and should be used earlier in the process. While mediation is being used in many tribunal and administrative board settings, it should be used in the majority of such settings.